Supreme Court, U.S.
FILED
MAR 4 1991
OFFICE OF THE CLERK

No. 90-952

In The

Supreme Court of the United States

October Term, 1990

JANICE G. CLARK, et al.,

Appellants,

vs.

CHARLES "BUDDY" ROEMER, et al.,

Appellees.

On Appeal From The United States District Court For The Middle District Of Louisiana

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND THE MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND IN SUPPORT OF APPELLANTS

KATHLEEN L. WILDE
Counsel of Record
LAUGHLIN MCDONALD
NEIL BRADLEY
MARY WYCKOFF
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
44 Forsyth St NW – Suite 202
Atlanta GA 30303
(404) 523-2721

ANTONIO HERNANDEZ
JUDITH SANDERS CASTRO
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
140 East Houston St – Suite 300
San Antonio TX 78205
(512) 224-5476

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of Amici Curiae 1

Summary of Argument 3

Argument 5

I. UNPRECLEARED CHANGES ARE NULL AND VOID AND MUST CONSISTENTLY BE ENJOINED TO ENSURE CONTINUED COMPLIANCE WITH SECTION 5. 5

II. CHANGES SUBJECT TO SECTION 5 MUST BE INDEPENDENTLY SUBMITTED; THERE IS NO SUCH THING AS "RETROACTIVE PRECLEARANCE" 13

III. ONCE AN OBJECTION HAS BEEN ENTERED, COURTS MUST ORDER AFFIRMATIVE RELIEF AND REQUIRE THE JURISDICTION TO DISMANTLE ALL VOTING CHANGES IMPLEMENTED IN VIOLATION OF SECTION 5. 16

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Allen v. State Board of Elections, 393 U.S. 544 (1969) ..... *passim*

Berry v. Doles, 438 U.S. 190 (1978) 9, 10, 17, 18

Brooks v. Georgia State Board of Elections, ___ U.S. ___, 111 S.Ct. 288 (1990) 2, 12, 25, 26

Busbee v. Smith, 549 F.Supp. 494 (D.D.C. 1982) aff'd 459 U.S. 1166 (1983) 23

Canady v. Lumberton City Board of Education, 454 U.S. 957 (1981) 9, 16, 21, 23

City of Rome v. United States, 446 U.S. 156 (1980) 17

Connor v. Waller, 421 U.S. 656 (1975) (per curiam) 6, 21, 22

County Commission, Hale County, Ala. v. United States, No. 76-772, 45 U.S.L.W. 3439 (Dec. 7, 1976) 10

Edge v. Sumter County, 775 F.2d 1509 (11th Cir. 1985) 17

Georgia v. United States, 411 U.S. 526 (1973) .. 9, 11, 18

Georgia State Board of Elections v. Brooks, ___ U.S. ___, 111 S.Ct. 288 (1990) 9

Haith v. Martin, 618 F.Supp. 410 (E.D.N.C. 1985), summarily aff'd 477 U.S. 901 (1986) 14, 18, 19

Hathorn v. Lovorn, 457 U.S. 255 (1982) 9, 21, 22

Holt v. City of Richmond, 406 U.S. 903 (1972) . 9, 16, 23

Hunter v. City of Monroe, LA, Civil Action 90-2031 (W.D.La. Nov. 7, 1990) 25

TABLE OF AUTHORITIES – Continued

Page

LULAC v. Clements, 914 F.2d 620 (5th Cir. 1990) (en banc) 25

Lucas v. Townsend, 486 U.S. 1301 (1988) 16, 18

McCain v. Lybrand, 465 U.S. 236 (1984) ..... *passim*

Moore v. Leflore County Board of Election Commissioners, 351 F.Supp. 848 (N.D.Miss. 1971) 12

NAACP v. Hampton County Election Commission, 470 U.S. 166 (1985) ..... *passim*

Oden v. Brittain, 396 U.S. 1210 (1969) 11

Perkins v. Matthews, 400 U.S. 379 (1971) ..... *passim*

Scaggs v. Larsen, 396 U.S. 1206 (1969) 12

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 6, 11, 23

United States v. Board of Supervisors of Warren Co., Miss., 429 U.S. 642 (1977) 16, 20

United States v. County Commission Hale County, Alabama, 425 F.Supp. 433 (S.D.Ala.), aff'd mem., 430 U.S. 924 (1977) 10

United States v. Georgia, Civ. Action No. C76-1531A (N.D.Ga., Sept. 30, 1977), summarily aff'd, 436 U.S. 941 (1978) 16

United States v. Sheffield Board of Commissioners, 435 U.S. 110 (1978) 13, 15

Wilson v. North Carolina State Board of Elections, 317 F.Supp. 1299 (M.D.N.C. 1970) 12

Wise v. Lipscomb, 437 U.S. 535 (1978) 3, 22

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

28 C.F.R. § 51.27 13

42 U.S.C. § 1973 10

42 U.S.C. § 1973b 10

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c ..... *passim*

The Fourteenth Amendment 1, 3

The Fifteenth Amendment 1, 6

OTHER AUTHORITIES

Comptroller General of the United States, *Voting Rights Act – Enforcement Needs Strengthening* (1978) 7

H. Rep. 97-227, 97th Cong., 1st Sess. (1981) 15

L. McDonald, "The 1982 Extension of Section 5 of the Voting Rights Act: The Continued Need for Preclearance," 51 *Tenn. L. Rev.* 1 (1983) 8

S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982) 7, 8

U.S. Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* (1981) 8

INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide membership organization with over 275,000 members. It has a longstanding concern with promoting equality of the franchise, both through the fourteenth and fifteenth amendments, and through federal statutory guarantees such as Sections 2 and 5 of the Voting Rights Act of 1965. Indeed, the ACLU was actively involved in the effort to convince Congress in 1982 to extend the Voting Rights Act, and to adopt the "results" test as the standard for proving vote dilution.

The ACLU has maintained a Southern Regional Office since 1965 which operates a Voting Rights Project. The project has four staff lawyers whose primary area of practice is voting rights. Attorneys for the ACLU have handled numerous voting rights cases in the past twenty-five years, including *Rogers v. Lodge*, 458 U.S. 613 (1982) and *McCain v. Lybrand*, 465 U.S. 236 (1984). Much of that litigation was and continues to be brought in states which are covered, in whole or part, by the preclearance requirements of Section 5 of the Voting Rights Act, including Georgia, North Carolina, South Carolina and Virginia.

As an organization which has dedicated considerable resources to the enforcement of the Voting Rights Act, particularly in the Southern United States, ACLU has a distinct and cognizable interest in prompt and effective judicial enforcement of Section 5.

More specifically, the ACLU has a direct interest in having this Court more clearly delineate the remedy to be imposed upon jurisdictions which continue to implement

unprecleared changes after a substantive objection by the Attorney General. As lawyers for litigants under Section 5 of the Voting Rights Act, and most recently as attorneys for plaintiffs in *Brooks v. Georgia State Board of Elections*, ___ U.S. ___, 111 S.Ct. 288 (1990), the ACLU is continually faced with the question of the appropriate remedy – beyond a mere prospective injunction – for violations of Section 5. This case squarely presents a history of both non-compliance by the state and woefully inadequate enforcement by the district court. An opinion by this Court discussing these remedial issues would be beneficial to the litigants, and *amici* believe that their experience would be beneficial to the Court.[1]

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization established in 1967. Its principal objective is to secure, through litigation and education, the constitutional and civil rights of Hispanics living in the United States. Protective of all rights of course is the fundamental right to vote.

[1] Plaintiffs raised similar remedial issues in their cross-appeal in *Brooks v. Georgia State Board of Elections*, No. 90-272 However, this Court summarily affirmed. 111 S.Ct. 288 (1990). The instant case provides the Court an opportunity to consider the question in a plenary fashion. The district court here adopted that part of the *Brooks* remedial order which permitted the judges sitting in objected-to judicial positions to continue to serve during the pendency of a declaratory judgment action in the United States District Court for the District of Columbia, and to remain in office even if the state is again denied preclearance "for 150 days after the finality of judgment in that case." J.S. App. 74a-77a.

MALDEF and its attorneys have engaged in substantial litigation to protect the right of Hispanics to an undiluted vote as guaranteed by the Fourteenth Amendment, *Wise v. Lipscomb*, 437 U.S. 535 (1978), *see also Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 59 U.S.L.W. 3461 (U.S. Jan. 7, 1991); as guaranteed by § 2 of the Voting Rights Act, *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1534 (1989); and as guaranteed by § 5 of the Voting Rights Act, *City of Lockhart v. United States*, 460 U.S. 125 (1983).

As an organization which has devoted considerable resources to the protection of the fundamental right to vote, MALDEF has a considerable interest in this case.

Appellants and appellees have both consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

The State of Louisiana, in implementing covered changes without first obtaining preclearance as required by Section 5 of the Voting Rights Act, clearly and deliberately "flouted the law." By refusing to enjoin further elections of those unprecleared statutes, despite a substantive objection by the Attorney General, the district court sanctioned that defiance, in disregard of both the decisions of this Court and the intent of Congress. Its order seriously undermined the remedial goals of Section 5, and must be reversed.

The district court also disregarded settled law in holding that more than 30 covered changes had been "retroactively precleared." Both the Section 5 regulations and the decisions of this Court make it clear that the state must independently and unambiguously submit each covered change, and assume the burden of proving that the change has neither a discriminatory purpose nor result. Here, once the changes were submitted, the Attorney General entered an objection on the merits. The court's finding that preclearance of subsequently enacted legislation automatically precleared the earlier changes, despite the Attorney General's finding to the contrary, failed to accord the proper deference to his construction of the Act, and improperly nullified his objection.

A denial of preclearance is a watershed point in Section 5 jurisprudence, and requires the imposition of affirmative relief. Unlike a failure to submit a change for preclearance, a substantive objection is a finding that the jurisdiction has failed to prove that the proposed changes have no racially discriminatory intent or effect. A district court has an obligation to enforce that objection to the same extent and on the same terms as an objection by the United States District Court for the District of Columbia.

Failure to obtain preclearance renders the changes null and void, and requires that the judicial positions be dismantled and the incumbents removed. Where, as here, preclearance has been sought and denied, there is no justification for any further delay in imposing that remedy. The addition of judgeships is clearly a covered change, and the commands of Section 5 are unequivocal. Any lesser remedy would remove any incentive for a

jurisdiction to *preclear* covered changes, and pave the way for further defiance.

On remand, the district court is free to consider whatever disruption might result, and to order interim relief as needed, including an election plan which cures the Attorney General's objection and allows the judgeships to be filled in accordance with the requirements of the Voting Rights Act.

ARGUMENT

I. UNPRECLEARED CHANGES ARE NULL AND VOID AND MUST CONSISTENTLY BE ENJOINED TO ENSURE CONTINUED COMPLIANCE WITH SECTION 5

The order of the district court allowing elections to go forward pursuant to statutes which are subject to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and which had been objected to by the Attorney General, was in clear violation of the decisions of this Court and the intent of Congress. The most fundamental tenet of Section 5 is the requirement that every change in an election standard, practice or procedure in a covered jurisdiction must be submitted for and receive preclearance, either from the Attorney General or the United States District Court for the District of Columbia, *prior to its implementation*. Statutes that are subject to Section 5 are not "effective as laws until and unless [they are] cleared" by federal authorities. *McCain v. Lybrand*, 465 U.S. 236, 245

(1984), citing *Connor v. Waller,* 421 U.S. 656 (1975)(per curiam).

Section 5 of the Voting Rights Act was enacted in response to the "unremitting and ingenious defiance" by states of the command of the Fifteenth Amendment. *South Carolina v. Katzenbach,* 383 U.S. 301, 309 (1966). Finding that "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits," Congress exercised its constitutional authority to "prescribe[] remedies for voting discrimination which go into effect without any need for prior adjudication." *Id.*, at 327-28.

The most stringent of these remedies is the preclearance requirement of Section 5. It prevents any "covered jurisdiction," *i.e.* a jurisdiction which has engaged in certain violations of the Fifteenth Amendment, from implementing any election practice different from those in effect on the date of its coverage under Section 5 until it has first demonstrated, to the satisfaction of either the Attorney General or the United States District Court for the District of Columbia, that the proposed change has no racially discriminatory purpose or effect.

Because of the "acknowledged . . . inability of the Justice Department – given limited resources – to investigate independently all changes with respect to voting enacted by States and subdivisions covered by the Act," *Perkins v. Matthews,* 400 U.S. 379, 392, n. 10 (1971), voluntary compliance with the preclearance provisions is key to its operation as an effective protection of minority

voting rights. As Congress noted in extending the Voting Rights Act in 1982:

> Timely submission of proposed changes before their implementation is the crucial threshold element of compliance with the law. The Supreme Court has recognized that enforcement of the Act depends upon voluntary and timely submission of changes subject to preclearance.

S. Rep. No. 97-417, 97th Cong., 2d Sess. 47 (1982).

In practice, however, covered jurisdictions have frequently ignored the requirements of Section 5. In a report issued in 1978, the Comptroller General of the United States found that literally hundreds of voting changes had been implemented in Alabama, Arizona, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia without submission or compliance with the statute, and called for the strengthening of preclearance enforcement. Comptroller General of the United States, *Voting Rights Act – Enforcement Needs Strengthening* 13 (1978). Testimony before the house and senate in 1981 and 1982 revealed continuing and widespread non-compliance with Section 5, which was cited by Congress as a principal reason for its decision to extend Section 5 for an additional twenty-five years. S. Rep. No. 97-417, *supra,* at 12-5. According to the Senate report:

> The extent of non-submission documented in both the House hearings and those of this [Senate] committee remains surprising and deeply disturbing. There are numerous instances in which jurisdictions failed to submit changes before implementing them and submitted them only, if at all, when sued or threatened with suit.

> Simply put, such jurisdictions have flouted the law and hindered the protection of minority rights in voting.

S. Rep. No. 97-417, *supra*, at 47-48, cited in *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 175 n. 19 (1985). For a further discussion of the extent of non-compliance with Section 5, *see* U.S. Comm'n on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* 64-75 (1981); L. McDonald, "The 1982 Extension of Section 5 of the Voting Rights Act: The Continued Need for Preclearance," 51 *Tenn.L.Rev.* 1, 62-80 (1983).

In the instant case, the State of Louisiana clearly and deliberately "flouted the law." Although the state sometimes sought preclearance of newly enacted judgeships for the district courts and courts of appeals, it failed to do so in each of the instances at issue here until 1987, after the commencement of this litigation. The District Court expressly found that:

> The State of Louisiana has absolutely no excuse for its failure, whether negligent or intentional, to obtain preclearance of legislation when such preclearance is required by the Voting Rights Act.

J.S. App. 7a. The court went on to note that this was not "the first time a three-judge court in the Middle District of Louisiana was confronted with the problem of hearing a suit seeking to enjoin an election because of the state's failure to obtain preclearance . . . "

Because voluntary compliance has been subjected to such widespread abuse, and in order to ensure effective enforcement of protected voting rights, Congress and this Court have insisted again and again that a trial court

must, when presented with a violation of Section 5, take swift and decisive action. If the jurisdiction and the voting practice in question are covered by Section 5 and if there has been no preclearance, it is the duty of the district court to enjoin any implementation of the change. *McCain v. Lybrand, supra; Georgia v. United States*, 411 U.S. 526, 541 (1973); *Canady v. Lumberton City Board of Education*, 454 U.S. 957 (1981); *Holt v. City of Richmond*, 406 U.S. 903 (1972). Unprecleared voting changes are null and void, and may not be enforced. *Hathorn v. Lovorn*, 457 U.S. 255, 270 (1982); *Perkins v. Matthews, supra; Allen v. State Board of Elections*, 393 U.S. 544, 572 (1969). *Also see, Georgia State Board of Elections v. Brooks*, ___ U.S. ___, 111 S.Ct. 288 (1990), affirming the decision of a three-judge court enjoining further elections for unprecleared judgeships in Georgia.

The district court attempted to excuse its departure from settled precedent by arguing that it had equitable power to suspend the operation of Section 5 and to allow the people elected to serve on a "provisional" basis. J.S.App. 48a-49a. The decisions relied upon by the district court simply do not support its argument.

None of the decisions of this Court cited by the court below involved voting changes that were admittedly subject to Section 5 and which had actually been objected to by the Attorney General, as in the instant case. *Perkins v. Matthews, supra, Berry v. Doles*, 438 U.S. 190 (1978), and *NAACP v. Hampton County Election Commission, supra*, each involved changes that had been implemented without ever having been submitted to, or objected to, by either the Attorney General or the federal court. There is, therefore, nothing in any of those cases that justifies the

extraordinary action of the district court in this case of allowing the further implementation of voting changes that have actually been objected to by the Attorney General. *See also* discussion at pages 17-18, *infra*.

The court below also erred in claiming that the Supreme Court "approved an order very similar to that issued by this court" in *United States v. County Commission, Hale County, Alabama*, 425 F.Supp. 433, 436 (S.D.Ala.), *aff'd mem.*, 430 U.S. 924 (1977). To the contrary, the questions presented to this Court in *Hale County* involved only coverage, and not the remedial provisions cited by the court below. Specifically, the questions presented in the Jurisdictional Statement were limited to: "(1) Do provisions of Voting Rights Act of 1965, 42 U.S.C. §§ 1973, 1973b, 1973c apply to Hale County, Alabama? (2) Have Attorney General of United States and Director of Census made such certifications and determinations as are required by 42 U.S.C. § 1973b(b) to effectuate applicability of provisions of 42 U.S.C. § 1973c to Hale County, Alabama?" *County Commission, Hale County, Ala. v. United States*, No. 76-772, 45 U.S.L.W. 3439 (Dec. 7, 1976).

Moreover, *Hale County* was decided prior to *Berry v. Doles, supra*, and *NAACP v. Hampton County Election Commission, supra*. In addition, certain of the voting changes in *Hale County*, unlike in the present case, were still being evaluated by the Attorney General for preclearance at the time the three-judge court entered its order. *United States v. County Commission, Hale County, Alabama, supra*, 425 F.Supp. at 436. Whatever basis there may have been for a "provisional" remedy in *Hale County* are absent in this case.

In *Georgia v. United States*, 411 U.S. 526 (1973), also relied upon by the lower court, J.S.App. 46a, this Court stayed enforcement of an injunction issued by a three-judge court against use of an unprecleared house reapportionment plan pending resolution on appeal of the then undecided issue whether state reapportionment was subject to Section 5, and whether the Attorney General had interposed an objection in a timely manner. *Id.* at 531. In resolving the case on the merits, this Court found the change was covered, affirmed the injunction issued by the three-judge court, and enjoined "any future elections" under the plan absent compliance with Section 5. *Id.* at 514. In the present case, there are no questions of first impression involving the coverage of Section 5 or the timeliness of the Attorney General's objection. Thus, *Georgia v. United States* provides no basis for the action of the court below in allowing the objected-to elections to go forward.

The district court's reliance on *Oden v. Brittain*, 396 U.S. 1210 (1969)(Black, J. in chambers) is also misplaced. In *Oden*, Justice Black explained his refusal to issue an injunction against interim use of an unprecleared increase in the size of the Anniston, Alabama City Council by citing his own *dissenting opinion* in *South Carolina v. Katzenbach, supra*, 383 U.S. at 355-362, for the proposition that "intervention" by the federal government in state and local electoral affairs under Section 5 was "unwarranted," 396 U.S. at 1211. Given the existing body of Section 5 law, Justice Black's in chambers opinion in *Oden* can hardly be deemed controlling or persuasive. In addition, Justice Black denied the injunction, despite the fact that he believed there was "considerable support" for the

applicants' position, 396 U.S. at 1211, because applicants had not shown that the possibility of obtaining a hearing below had been exhausted and he therefore doubted that he had the authority to grant the relief requested. *Id.* at 1212.

Scaggs v. Larsen, 396 U.S. 1206 (1969), another decision relied upon by the court below, J.S.App. 40a n.55, has nothing whatever to do with Section 5 or voting rights, and it is not apparent how the opinion is relevant to any issue presented in this litigation. *Moore v. Leflore County Board of Election Commissioners*, 351 F.Supp. 848, 850 (N.D.Miss. 1971), and *Wilson v. North Carolina State Board of Elections*, 317 F.Supp. 1299, 1301 (M.D.N.C. 1970), cited at J.S.App. 46a, involved voting changes which had neither been submitted for preclearance nor objected to under Section 5. They are therefore not applicable to the facts and issues in the present case.

The present case is not one in which the preclearance issue is of first impression or in which the objectionable nature of the change is in the slightest doubt. This Court has held that the changes in question are subject to Section 5, *see Brooks, supra*, while the Attorney General has objected to *these very changes*. One would be hard-pressed to find a case in which the decision of the three-judge court permitting the election of unprecleared judgeships to proceed was more inconsistent with settled law and the basic purposes of the Voting Rights Act.

In refusing to enjoin the elections for unprecleared judicial positions in this case, the district court disregarded overwhelming precedent and seriously undermined the remedial goals of Section 5. Its orders sanction

the state's continuing violation of Section 5 and should be reversed.

II. CHANGES SUBJECT TO SECTION 5 MUST BE INDEPENDENTLY SUBMITTED; THERE IS NO SUCH THING AS "RETROACTIVE PRECLEARANCE"

The district court unilaterally exempted from preclearance more than 30 covered election changes to which the Attorney General had objected on the ground that the changes were retroactively precleared by subsequent Section 5 submissions. In so doing, it not only disregarded well-settled law, but also nullified the preclearance determination of the Attorney General, a decision over which it had no lawful authority.

In order to obtain preclearance of a covered change, the jurisdiction must formally submit the change in the form required by 28 C.F.R. § 51.27, and assume the statutory burden of proving that the change has neither a discriminatory purpose nor effect. 42 U.S.C. § 1973c. The state did neither until 1987 when it submitted the changes to the Attorney General in conjunction with this litigation.

It is well-settled that in order to satisfy the requirements of Section 5, a change must be submitted "in some unambiguous and recordable manner." *Allen*, 393 U.S. at 571. *See also McCain v. Lybrand*, 465 U.S. 236 (1984); *United States v. Sheffield Board of Commissioners*, 435 U.S. 110 (1978). State officials have independent submission burdens respecting each covered change. As this Court

explained, in reversing a district court finding of "retroactive preclearance" in *NAACP v. Hampton County Election Commission*:

> A change that was never submitted at all does not meet this standard.

470 U.S. at 182.

Nor does the submission of *subsequently* enacted legislation bring the *prior* change before the Attorney General for review:

> When a jurisdiction adopts legislation that makes clearly defined changes in its election practices, sending that legislation to the Attorney General merely with a general request for preclearance pursuant to § 5 constitutes a submission of the changes made by the enactment and cannot be deemed a submission of changes made by previous legislation which themselves were independently subject to § 5 preclearance.

McCain v. Lybrand, 465 U.S. at 256-57.[2] *See also Haith v. Martin*, 618 FSupp. 410, 413 (E.D.N.C. 1985), summarily aff'd, 477 U.S. 901 (1986), rejecting argument that certain session laws creating new elected judgeships in North Carolina were "precleared by inclusion" in later enactments of the General Assembly.

[2] In this case, as in *McCain*, it is undisputed that:

(1) the jurisdiction is subject to Section 5;

(2) the changes at issue are subject to the preclearance requirement; and

(3) the changes were never submitted for preclearance at the time of their enactment. 465 U.S. at 250.

The policy reasons for such a rule are readily apparent. The Attorney General has limited resources, and cannot monitor changes never brought to his attention. "[T]he purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." *United States v. Sheffield Board of Commissioners, supra*, 435 U.S. at 136. To permit the submission of a subsequent change to preclear an earlier, unsubmitted change would allow "circumvention of the requirement which itself was designed to eliminate circumvention of the goals of the Act. H.R. Rep. 97-227 [97th Cong., 1st Sess.] p. 13 (1981)." *McCain*, at 249.

Here, the changes, some of which were enacted as long ago as 1968, were not submitted for preclearance until after plaintiffs moved to amend the complaint to add Section 5 violations in 1987. Once the changes were submitted, the Attorney General objected on the merits. The State of Louisiana twice sought reconsideration, and the Attorney General twice reiterated his objection, on September 17, 1990 and October 9, 1990. Nevertheless, the district court, by order of October 22, 1990, held that the statutes had been previously precleared by virtue of the preclearance of subsequently enacted legislation. By so doing, it erred as a matter of law.

The district court not only failed to follow the holding of *McCain*, but in refusing to enjoin the changes on the grounds that they had already been precleared, it wholly disregarded and nullified the Attorney General's finding that the statutes had *not* been precleared, and

were objectionable because they have a racially discriminatory effect. As this Court has repeatedly reiterated, the Attorney General's construction of the Act, and of the scope of its own objections, is entitled to "considerable deference." *NAACP v. Hampton County Election Commission*, at 179. This Court has at least twice previously relied upon statements by the Justice Department in determining whether a change has been precleared. *McCain v. Lybrand*, 465 U.S. at 255-56; *United States v. Georgia*, Civ. Action No. C76-1531A (N.D. Ga., Sept. 30, 1977), *summarily aff'd*, 436 U.S. 941 (1978). The district court erred in failing to give the necessary deference to the coverage determination of the Attorney General and in considering *de novo* whether preclearance had been obtained.

III. ONCE AN OBJECTION HAS BEEN ENTERED, COURTS MUST ORDER AFFIRMATIVE RELIEF, AND REQUIRE THE JURISDICTION TO DISMANTLE ALL VOTING CHANGES IMPLEMENTED IN VIOLATION OF § 5

This Court has had frequent occasion to delineate the appropriate remedy in cases where an unsubmitted or objected-to change is about to be, but has not yet been, enforced: the change may not be implemented until preclearance is obtained. *Allen v. State Board of Elections*, 393 U.S. 544 (1969); *United States v. Board of Supervisors of Warren Co., Miss.*, 429 U.S. 642, 645 (1977). Where the district court has failed to enjoin illegal implementation, this Court has as a matter of course granted applications for a stay. *See, e.g., Holt v. City of Richmond*, 406 U.S. 903 (1972); *Canady v. Lumberton City Board of Education*, 454 U.S. 957 (1981); *Lucas v. Townsend*, 486 U.S. 1301 (1988).

Similarly, this Court has on several occasions considered the appropriate remedy in cases where the jurisdiction has implemented a covered change without first seeking preclearance under Section 5. While acknowledging that an unprecleared change is legally unenforceable, this Court has authorized district courts, in formulating relief, to examine the reasons why no preclearance was sought, as well as the need for an order reinstating the *status quo ante*.[3] So, for example, where it was not "reasonably clear at the time of [implementation] that the changes were covered by Section 5," *Perkins v. Matthews*, 400 U.S. 379, 396 (1971), this Court has indicated that it might be appropriate to allow the covered jurisdiction thirty (30) days within which to apply for preclearance before imposing affirmative relief. *See, e.g., Berry v. Doles*, 438 U.S. 190, 192-93 (1978); *N.A.A.C.P. v. Hampton County Election Commission, supra*, 470 U.S. at 182.

What this Court has not yet had occasion to consider – and what is squarely presented by this case – is the remedy required when a change has been illegally implemented and an objection has been entered by the

---

[3] Invalidating the unprecleared change automatically reinstates the "last valid plan in effect." *Edge v. Sumter County*, 775 F.2d 1509 (11th Cir. 1985), citing *Allen v. State Board of Elections*, 393 U.S. 544 (1969) and *Perkins v. Matthews*, 400 U.S. 379-383-85 (1971). The "last valid plan in effect" here is the judicial system as it existed on November 1, 1964, with such changes as have subsequently been precleared. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 182 (1980).

Attorney General.[4] In this case, preclearance was twice sought and twice denied *before the district court entered its final remedial order. Amici* submit that these facts render the instant case quite different from preceding cases and require additional, affirmative relief.

A denial of preclearance, whether by the Attorney General or the United States District Court for the District of Columbia, is not merely another fact to be considered; it is watershed point in Section 5 jurisprudence. Unlike a failure to submit a change for preclearance, the Attorney General's decision denying preclearance is a substantive finding that the jurisdiction has failed to carry its burden of proving that the proposed change has neither a discriminatory purpose nor a discriminatory effect. *See Georgia v. United States*, 441 U.S. 526 (1973). Whatever the propriety of weighing factors such as disruption or confusion in determining whether to enjoin an unprecleared change *prior* to federal review,[5] such considerations have

---

[4] In each of the cases previously addressed by this Court in which an unprecleared change had already been implemented, no objection had yet been entered. In *Perkins, Berry* and *Hampton*, for example, no preclearance had yet been sought. In *Lucas v. Townsend*, preclearance was pending at the time the stay was requested, but no determination had yet been made.

[5] *Amici* would argue that "disruption" has no place in the remedial calculus even where preclearance has *not* yet been sought. Neither *Perkins* nor *Hampton* include disruption among the relevant factors to be considered. Further, the district court in *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985) (3 judge), summarily aff'd, 477 U.S. 901 (1986), in an opinion entered and affirmed by this Court *after* both *Perkins* and *Hampton* were

(Continued on following page)

no place once the change is submitted and a substantive objection entered.[6] To permit a change which has an adverse racial purpose or effect to remain in effect would nullify the entire Section 5 process.

Here the district court allowed Louisiana, which implemented judicial election statutes without preclearance *knowing* that preclearance was required, to proceed with elections as to the unprecleared posts *despite an objection on the merits by the Attorney General*. It further permitted the judges thereby elected to take and remain

---

(Continued from previous page)

decided, refused to limit its remedy to prospective relief despite what it found to be "great efforts . . . by the Executive Secretary of the [N.C.] State Board of Elections to comply with the requirements of the Voting Rights Act of 1965," on the grounds that

> *the Act does not give this Court power to provide equitable relief* to Defendants, no matter how just their cause.

Haith, supra, at 414.

[6] The district court's balancing scheme (J.S.App. 31a-39a) and analogies to "action taken in similar cases by the United States Supreme Court and other three-judge courts" (J.S.App. 39a-49a) wholly ignore the one dispositive fact in this case: the Attorney General's objection under Section 5 of the Voting Rights Act.

Moreover, part of the "balancing" in which the court engaged has absolutely *no* place in Section 5 jurisprudence. If a state has failed to seek or obtain preclearance, it has forfeited any cognizable interest "in managing [its] own affairs consistent with the Constitution . . . " (J.S.App. 36a), and there is no authority which permits a district court to weight such an interest against "the rights of the plaintiffs under the Voting Rights Act of 1965," let alone to give that interest *dispositive* weight.

in office while the state pursues *judicial* preclearance, by filing and litigating an action for declaratory judgment in the District Court for the District of Columbia. In so doing, it not only rewarded the state for illegally implementing the changes, it also rendered the Attorney General's findings – and thereby the preclearance requirement itself – of no legal effect.[7]

Contrary to the implicit view of the district court, an objection by the Attorney General is not just another "step in the preclearance process." An objection by the Attorney General stands on equal footing with a preclearance decision by the United States District Court for the District of Columbia. Administrative preclearance is an *alternative* forum, enacted by Congress to provide jurisdictions with a more expeditious route for preclearance than litigation, not a "less valid" one. S. Rep. No. 97-417, *supra*, at 13. There is no "preclearance hierarchy," such as that created here by the district court. The district court was under an obligation to enforce the Attorney General's Section 5 objection to the same extent and on the same terms as an objection by the United

---

[7] Neither the district court nor this Court on appellate review has the authority to second-guess the Attorney General's substantive determination on preclearance. The only questions within the authority of the three-judge court in a Section 5 proceeding are:

(a) whether the jurisdiction is covered;

(b) whether the change is one affecting voting; and

(c) whether there has been preclearance.

Perkins v. Matthews, 400 U.S. 379, 383-85 (1971); *United States v. Board of Supervisors of Warren County, Miss*, 429 U.S. at 647. *See also Allen v. State Board of Elections, supra.*

States District Court for the District of Columbia. *Canady v. Lumberton City Board of Education, supra.*

This Court has already provided some guidance to the district courts as to the appropriate remedy once preclearance is denied. Anticipating the possibility of an objection on the merits once changes were submitted, this Court, in *Perkins v. Matthews*, 400 U.S. at 397 and again in *NAACP v. Hampton*, 470 U.S. at 182-83, instructed that the district court should invalidate any elections held using the unprecleared changes. Therefore, at a minimum, the results of the elections held for the unprecleared judgeships here must be set aside. However, further relief is required.[8]

It has long been a matter of black letter law that voting practices covered by Section 5 are not "effective as laws until and unless they are precleared . . . " *Connor v. Waller*, 421 U.S. 656 (1975); *McCain v. Lybrand, supra.* That proposition has been reiterated in many ways over the years. Failure to obtain preclearance "renders the change unenforceable," *Hathorn v. Lovorn*, 456 U.S. 255 (1982); unprecleared voting changes are null and void and may not be enforced. *Allen v. State Board of Elections*, 393 U.S. 544, 572 (1969); *Perkins v. Matthews*, 400 U.S. at 397. If the oft-repeated language of Section 5 caselaw is to continue to have any viability whatsoever, then the appropriate

---

[8] Even the district court understood that at some point, the judges must be removed from office. J.S.App. 55a. Its error was not in the form of the remedy, but in permitting them to remain in the unprecleared seats *after* an objection had been entered by the Attorney General, while Louisiana sought judicial preclearance.

remedy, after an objection on the merits by the Attorney General must in fact be to declare the unprecleared changes null and void. In the instant case, that means that the unprecleared judicial positions must be dismantled, and the incumbents removed from their illegal seats.

Once the offices have been declared vacant, this Court should remand the case to the three-judge court, which has the power to fashion appropriate interim relief. *Hathorn v. Lovorn*, 456 U.S. 255, 270 (1982). Such relief could include a court-ordered interim election plan, tailored to remedy the Attorney General's objections to the method of electing the new judgeships, which would allow the judgeships to be filled until Louisiana obtains preclearance of another election plan.[9] Similar remedies have been deemed appropriate in reapportionment cases, for example, where election plans are invalidated under Section 5 and the state is unwilling or unable to adopt a plan which can receive Section 5 preclearance. *Wise v. Lipscomb*, 437 U.S. 535, 542 (1978); *Connor v. Waller*, 421 U.S. 656 (1975). What is clear, however, is that the district court may not permit the judges elected pursuant to the objected-to statutes to continue in office.

Amici are fully aware that declaring the positions vacant will result in a period of disruption and possibly

---

[9] Louisiana could, of course, pursue its declaratory judgment action in the United States District Court for the District of Columbia, seeking judicial preclearance of the statutes to which the Attorney General has objected. Or the state legislature could pass new legislation, changing the method of electing the judicial positions that are the subject of the objection, and submit these new statutes for preclearance.

hardship for the State of Louisiana and its judiciary. That is, however, the remedy intended by Congress, *South Carolina v. Katzenbach, supra*, and routinely implemented by the courts in cases involving legislative bodies and city or county councils. *See, e.g., Holt v. City of Richmond*, 406 U.S. 903 (1972); *Canady v. Lumberton City Board of Education, supra; Busbee v. Smith*, 549 F.Supp. 494, 497, n.1 (D.D.C. 1982) (three judge). The appropriate context in which to consider any possible disruption or confusion is on remand, *after* the objected-to judgeships have been dismantled and the incumbents removed from office, *not* in imposing the initial remedy.

While such a result may seem at first blush to be harsh and unnecessary, it is important to remember that the statutes in this case do not involve merely the method of electing judges; they created the judgeships themselves. Thus, this is not a case in which, for example, the method of electing a pre-existing city council was changed from districts to at-large, or where staggered terms of office were implemented without Section 5 preclearance, and where the appropriate relief would involve an injunction against future use of the unprecleared practice and perhaps retroactive relief in the form of new elections. Here, the voting changes that have been denied preclearance are statutes creating the elected positions. Settled rules of Section 5 construction dictate that the objected-to statutes are unenforceable.

There is no justification for any modification of or delay in imposing that remedy. The Voting Rights Act was first enacted in 1965, and has been law for over 25 years. The pivotal case resolving the Act's constitutionality, and establishing the proper method of statutory

interpretation, was decided in 1969. *Allen v. State Board of Elections*, 393 U.S. 544. The questions concerning the scope of Section 5 and the procedures for obtaining preclearance, which created confusion in the early years, have been long since resolved. There is no excuse for further delay by the courts in carrying out the express intent of Congress: to require *pre*-clearance of changes in election procedures.

Further, whatever consequences occur are the direct result of the state's longstanding defiance of both the preclearance requirements and the findings of the Attorney General. Louisiana knew that the addition of judges and changes in district boundaries were covered changes, yet it implemented the changes without seeking preclearance. Indeed, the changes – some of which were implemented as long ago as 1968 – were not submitted for Section 5 preclearance until July of 1987, after litigation was filed under Sections 2 and 5 of the Voting Rights Act. The state refused to provide supplemental information requested by the Attorney General on four separate occasions, forcing him to rely upon the evidence and findings of the Section 2 court to complete the preclearance review (J.S.App. 109a-110a). By letters dated September 23, 1988 and May 12, 1989, the Attorney General denied preclearance. Undaunted, Louisiana requested reconsideration, and the Attorney General refused to withdraw his objection. Nevertheless, the state has persisted in its enforcement of the "objected to" judgeships and "notwithstanding the interposition of far-reaching §5 objections in 1988 and 1989 . . . has failed to adopt a racially fair election system for its trial and appellate judges even though the [district] court has

given the state ample opportunity to do so." Attorney General's Letter of September 17, 1990 Denying Reconsideration, J.S.App. 153a. Having deliberately put itself on a collision course with Congressional authority, Louisiana has only itself to blame for any resulting problems.

In the final analysis, the only way to prevent future disruption is for this Court to clearly reiterate that the Voting Rights Act requires *pre*clearance, and that the remedy for illegal implementation is immediate return to the *status quo ante*. Lower courts – particularly in judicial election cases[10] – have begun to consider the "equities" of the illegal implementation, and the "status quo" has been accorded weight despite its legal nullity. As things now stand, the further the state has gone in its illegal implementation before it is "caught," the lighter the penalty and less relief afforded minority plaintiffs. If a lawsuit is brought before the change goes into effect, it is enjoined. *See Allen v. State Board of Elections*, 393 U.S. 544 (1969). But

---

[10] Federal judges have been much more sensitive to issues of disruption, and more reluctant to impose well-established remedies, in voting rights cases involving judicial elections. *See, e.g., Brooks v. Georgia State Board of Elections, supra; Hunter v. City of Monroe, LA*, Civil Action 90-2031 (W.D.La. Nov. 7, 1990) (Section 5 does not apply to elections for state court judgeships that are created and added to pre-existing judicial districts). See also *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc). There is no justification in either the language or legislative history of the Voting Rights Act for a "judicial elections" exception. Such a gloss, if permitted to stand, will seriously undermine the integrity of the Act.

if the state succeeds in implementing the change, it will likely stand while preclearance is sought. *See, e.g., Perkins v. Matthews*, 400 U.S. 379 (1971). And, under the holding of the three-judge court here, if the state ignores an objection by the Attorney General and declares its intention to continue to contest preclearance through the courts, it will be allowed to continue to enforce those changes despite the substantive objection. *See also Brooks v. Georgia State Board of Elections, supra.*[11]

For this Court to condone the remedial order of the district court would remove any incentive for a jurisdiction to preclear covered changes. To consider the disruption to the Louisiana judiciary that might result from an order removing the judges from the unprecleared positions and dismantling the unprecleared offices would be counter-productive in both the long and the short run.

---

[11] The district court in *Brooks* first issued an order requiring the state to dismantle the judgeships at the end of the incumbent's term, unless Georgia obtained preclearance of the positions. However, after preclearance was denied by the Attorney General, the court entered an order virtually identical to that entered here, allowing incumbents to remain in unprecleared offices until and unless preclearance was finally denied by the District Court for the District of Columbia.

The result of that modification was to totally remove any incentive from the State to adopt a racially fair system of election which would cure the Attorney General's objection, although that was under serious consideration by Georgia before the modification. Instead, improperly elected judges will likely continue to sit in objected-to positions for several more years. Although the lawsuit was filed in July 1988 and the first injunction was entered on December 1, 1989, preclearance litigation in D.C. has barely begun at the time of this writing.

The only way to avoid future disruption to a State's judiciary – or legislature or Congressional apportionment plan – is to reaffirm that preclearance means *pre*clearance.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reverse the decision of the three-judge district court for the Middle District of Louisiana; enter an order declaring the objected-to changes null and void; and remand for consideration of appropriate interim relief.

Respectfully submitted,

KATHLEEN L. WILDE
Counsel of Record
LAUGHLIN MCDONALD
NEIL BRADLEY
MARY WYCKOFF
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.
44 Forsyth St NW – Suite 202
Atlanta GA 30303
(404) 523-2721

ANTONIO HERNANDEZ
JUDITH SANDERS CASTRO
MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND
140 East Houston St – Suite 300
San Antonio TX 78205
(512) 224-5476

Attorneys for Amici Curiae